

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 18 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0400-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICHARD LIN GARRISON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR051322

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner Richard Garrison seeks review of the trial court's dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., after an

evidentiary hearing on his claims. For the following reasons, we grant review but deny relief.

¶2 After a jury trial in 1996, Garrison was convicted of aggravated assault, a dangerous-nature offense. Garrison had absconded before his trial but surrendered in 2009 after being served with a warrant in Virginia. The trial court sentenced him to a mitigated, five-year prison term. We affirmed his conviction and sentence on appeal. *State v. Garrison*, No. 2 CA-CR 2010-0006 (memorandum decision filed Nov. 22, 2010).

¶3 In his petition for post-conviction relief, Garrison alleged his trial counsel had been ineffective in failing to conduct adequate pre-trial investigation; in failing to request a hearing, pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), seeking suppression of witnesses' in-court identifications based on post-arrest identification procedures; and in failing to file certain pre-trial motions or address "other issues" raised in his petition.

¶4 At an evidentiary hearing, Garrison's appellate counsel, Emily Danies, and criminal attorney Richard Bock testified, respectively, that the trial appeared "less than adequate" and that Garrison's trial counsel, Michael Mussman, had "dropped the ball" in his investigation of the case, in pre-trial proceedings, or at trial. Mussman also testified about the basis of his decisions in the context of the facts of the case, as reported by Garrison, and the defense presented.

¶5 In a detailed, under-advisement ruling addressing each of the allegations raised, the trial court explained its conclusion that Garrison had failed to establish the deficient performance and prejudice required to prevail on a claim of ineffective

assistance of counsel. *See State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998) (to establish claim of ineffective assistance of counsel, petitioner must show counsel's performance fell below prevailing professional norms and caused prejudice to defense).

At the end of its order, the court commented,

Notwithstanding excellent Rule 32 work by defense counsel, the State's well-supported position must prevail. In the instant case, the overarching source of prejudice was the empty chair. Despite appropriate instruction, very seldom does this fact get overlooked by a jury. It is difficult enough to defend someone who absents themselves from the process. This difficulty is amplified when one is working with strong evidence (indeed, an admission) that [Garrison] did possess a firearm, and displayed it in such a manner that there were witnesses (including potential video) who would testify to that fact.

Garrison filed a motion for rehearing which the court denied; this petition for review followed.

¶6 On review, Garrison argues the trial court abused its discretion because the evidence presented at the evidentiary hearing did not support its ruling. He also maintains the court improperly considered his failure to appear at trial when assessing whether he had been prejudiced by counsel's performance.

¶7 Absent a clear abuse of discretion, we will not disturb a trial court's ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court's factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶8 In arguing that the evidence at the evidentiary hearing was insufficient to support the trial court’s findings and conclusions, Garrison ignores Mussman’s testimony, dismissing it as “self-serving.”¹ He thus contends the state “did not offer any controverting evidence” to rebut the testimony of his expert witnesses and, without citation to relevant authority, maintains “the uncontested testimony of two attorneys, that trial counsel had provided ineffective assistance based on the prevailing professional norm of competent counsel,” therefore must “be accepted as fact.” We do not find this proposition supportable. Rather, “[i]n assessing deficient performance, an effort is made to ‘eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’” *State v. Valdez*, 167 Ariz. 328, 331, 806 P.2d 1376, 1379 (1991), quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¶9 The trial court is the sole arbiter of witness credibility in post-conviction proceedings. See *State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). Moreover, it is for that court, not this one, to resolve any factual disputes underlying an ineffective assistance of counsel claim. See *State v. Herrera*, 183 Ariz. 642, 646, 905 P.2d 1377, 1381 (App. 1995). The court’s superfluous comment that Garrison more likely would have been prejudiced by his failure to appear than by any alleged deficiency

¹For example, Garrison challenges the trial court’s finding, based on Mussman’s notes and testimony, that Garrison had told Mussman he had brandished a gun and might have been videotaped doing so by security cameras. Notwithstanding Mussman’s testimony that he took these notes during an interview with Garrison shortly after his arrest in November 1995, Garrison argues it is “unknown” when Mussman made the notes and “the notes more likely than not were made . . . from the [state’s] disclosure” rather than his interview.

in counsel's performance, considered in the context of the court's nine-page order, is not reflective of the reasoned basis for the court's ruling. *Cf. State v. Dunlap*, 187 Ariz. 441, 461, 930 P.2d 518, 538 (App. 1996) ("Juries are presumed to follow their instructions.").

¶10 In the body of its order, the trial court clearly identified and thoroughly addressed each of Garrison's allegations and resolved them in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Ample evidence supported the court's findings, and no purpose would be served by repeating the court's analysis here. *See id.* Based on the record before us, the applicable law, and the court's assessment of the testimony presented at the evidentiary hearing, the court did not abuse its discretion in denying relief on Garrison's ineffective assistance of counsel claim. Accordingly, although we grant review, we deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge